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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BANKRUPTCY PLAN COMMITTEE OF THE BANK BUILDING & EQUIPMENT CORP. OF AMERICA, IN LIQUIDATION,

Petitioner,

vs.

RELIANCE INSURANCE CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT RELIANCE INSURANCE CO., IN OPPOSITION

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QUESTIONS PRESENTED

1. Where the court appointed bankruptcy representative asserts breach of fiduciary duty claims of the bankrupt company against the company's former officers, seeking to recover damages sustained by the company due to the officers' breach of duties to the company, under Delaware law does a directors and officers liability insurance policy excluding claims by or on behalf of the company against such officers preclude coverage for that lawsuit?

2. Where the Bankruptcy Code vests a bankruptcy representative with the exclusive right to pursue claims on behalf of the company, and the representative brings suit on such a claim against the company's officers without referring to the company's shareholders or satisfying any of the pre-requisites for a shareholders' derivative suit, under Delaware law is that action a shareholders' derivative suit that fits within an exception for such actions in an exclusion in a director and officers liability insurance policy that excludes claims by or on behalf of the company against its officers?

PARTIES TO THESE PROCEEDINGS

Petitioner is the Plan Committee of Bank Building and Equipment Corporation of America, In Liquidation.

Myron Carpenter, Douglas Clements and The Boatmen's National Bank of St. Louis are not parties to the proceeding in the court whose judgment is sought to be reviewed by this Court.

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BRIEF OF RESPONDENT RELIANCE INSURANCE CO., IN OPPOSITION

OPINION BELOW

The decision of the Court of Appeals for the Eighth Circuit, *Reliance Insurance Co. v. Weis, et al.*, 5 F.3d 532 (8th Cir. 1993), affirmed the District Court's finding, *Reliance Insurance Co. v. Weis, et al.*, 148 B.R. 575 (E.D. Mo. 1992), that the petitioner's action was brought "on behalf of" the bankrupt company against its own officers and that such claims were excluded from coverage by the "insured v. insured" provision of the directors

and officers liability insurance policy issued to the company by the respondent. The decisions of the Court of Appeals and the District Court are reproduced in the petitioner's appendix at P. App. 23a-24a and P. App. 7a-22a,[1] respectively.

JURISDICTION

The respondent adopts by reference the petitioner's statement of jurisdiction.

STATUTES INVOLVED

The respondent adopts by reference the petitioner's statement of the statutes involved in this proceeding.

STATEMENT OF THE CASE

The petitioner, the Bankruptcy Plan Committee (the "Plan Committee"), was established and authorized to act on behalf of the bankrupt Bank Building & Equipment Corporation of America ("BBC") in accordance with BBC Plan of Liquidation (the "Plan"), as approved by the bankruptcy court. The Plan specifically states that the Plan Committee was created to act *on behalf of BBC* and its estate. (Relevant portions of the Plan are reproduced in the appendix[2] to this brief.)

The Plan Committee's authority is governed by the U.S. Bankruptcy Code, 11 U.S.C. § 541(a)(1), which states that a bankruptcy estate is comprised of "all legal or equitable interests of the debtor," i.e. BBC. The Plan Committee's and the estate's rights are derived exclusively from BBC; they do not acquire or possess any other rights. The Plan Committee cannot, as suggested by the petitioner, pursue claims emanating from third parties such as BBC's creditors.

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[1] Reference to the Appendix of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, shall be made as (P. App. _____ a).

[2] References to the Respondent's Appendix to this brief shall be made as (Resp. App. _____).

The lower courts resolved a simple, straightforward question: Under Delaware law, is the action commenced by the Plan Committee against BBC's former officers excluded from coverage under the directors and officers liability insurance policy issued to BBC by the respondent, the Reliance Insurance Company (hereinafter "Reliance"), pursuant to the provision that excludes claims by or on behalf of the Company? Both the District Court and the Court of Appeals applied Delaware law, the law that governs the interpretation of the Reliance policy, found the exclusion applied, and granted judgment to Reliance.

The Plan Committee is an entity created solely as a result of BBC's bankruptcy, with only those powers and authority prescribed in the Plan and the U.S. Bankruptcy Code. The Plan itself states that the Plan Committee was selected to act on behalf of BBC, with the authority to assert claims *on BBC's behalf*. Section 1.31 of the Plan unequivocally states that the Plan Committee was appointed on behalf of BBC:

> The Plan Committee shall mean the Committee of three individual representatives, *selected on behalf of BBC* by BBC's unsecured creditors committee appointed in BBC's case pursuant to 11 U.S.C. § 1102(a)(1). . .

P. App. 5a, (Emphasis added.)

In addition, Article XII, Section 12.1 of the Plan authorizes the Plan Committee to prosecute the claims held by BBC's estate:

> This Plan contemplates the liquidation of all of the property of the Consolidated Debtors. . . and *the prosecution of any all claims or causes of action held by the estates of the Consolidated Debtors* by the Plan Committee. . . *on behalf of the Estate* prior to and after the Effective Date to the extent that the Plan Committee believes such prosecution to be feasible and warranted.

Resp. App. B-1, (Emphasis added.)

The Plan, Article I, Section 1.12, identifies BBC as one of the consolidated debtors:

> Consolidated Debtors shall mean the procedurally combined estates of *In re Bank Building and Equipment Corporation of America*, . . . *In re BBC Manufactured Buildings, Inc.*, . . . and *In re Accesseron Products, Inc.* . . .

Resp. App. B-1.

Similarly, Article XII, Section 12.3 of the Plan, provides that the Plan Committee " . . . shall be responsible for prosecuting and defending any and all claims relating to the Consolidated Debtors' estate. . ." Resp. App. B-1. Accordingly, the Plan Committee was authorized to pursue BBC's rights and claims, including BBC's claim against its officers for their breach of fiduciary duties and BBC's corresponding losses and damages.

Other provisions of the Plan confer upon the Plan Committee the authority to act as BBC's board of directors and pursue claims belonging to BBC, and describe the procedures to be followed by the Plan Committee. Article XIV, section 14.1 states:

> . . . The Plan Committee shall have the same authority to act for the Consolidated Debtors as a board of directors for each of the Consolidated Debtors . . . Upon confirmation, all causes of action belonging to any of the Consolidated Debtors shall vest and be brought in the name of the Plan Committee, on behalf of the particular Consolidated Debtor or Debtors in which the cause of action had been previously vested.

Resp. App. B-1, B-2.

A Disclosure Statement was also filed in BBC's bankruptcy proceedings, to obtain approval of the objectives of the Plan from BBC's creditors and other interested parties. Relevant portions of the Disclosure Statement are reproduced in the appendix to this brief. Under the "First Amended Disclosure Statement Filed

in Connection with the [Plan]" (hereinafter "the Disclosure Statement"), Article VII, section (C)6, provides that BBC's "Plan Committee . . . shall have the right to bring all actions and proceedings belonging to the Consolidated Debtors or their Estates. . ." Resp. App. C-1.

Article V of the Disclosure Statement, entitled "Ongoing Liquidation Efforts," identifies the very claim against BBC's former officers which became the subject of the Plan Committee Action and the instant declaratory judgment action:

> One of the potential causes of action is a claim *by BBC* against certain of its former officers . . . arising out of the alleged failure and fraud by Loughman Division officers and employees at the Loughman Division of BBC. The alleged misconduct of management of the Loughman Division and the potential causes of action are set forth in the report of the Court appointed Examiner, . . .
>
> * * *
>
> . . . Proponents expect the Plan Committee to employ special counsel to review the findings of the Examiner's report in order to determine in greater detail the possible legal actions available against certain officers of BBC, . . . and to assess and calculate any damages and to pursue any appropriate action *on behalf of BBC*.

Resp. App. C-1, (Emphasis added).

Special counsel (the very attorneys who filed this petition) were, in fact, retained by the Plan Committee to review the findings in the bankruptcy examiner's report and prosecute BBC's claim against its officers.

The authority to bring suit on BBC's causes of action was exercised by the Plan Committee in November of 1991, when it brought an action against BBC's former officers entitled *Richard Miller . . . acting in the name of the Plan Committee for the Bankruptcy Estate of Bank Building and Equipment Corp. of America v. Doug Clements, et al.* in the Circuit Court

of the County of St. Louis, State of Missouri (the "Plan Committee Action").

The Complaint in the Plan Committee Action alleged that "pursuant to the Plan, all causes of action belonging to the bankruptcy estate of Bank Building & Equipment Corp. vest and shall be brought in the name of the Plan Committee which has the sole responsibility for implementing the plan." Resp. App. D-2. Relevant portions of the Complaint are reproduced in the appendix to this brief.

The Plan Committee alleged that Doug Clements was an officer of BBC, and ". . . had a fiduciary duty to BBC to act in the best interests of BBC." Resp. App. D-2. Similarly, the complaint asserted that "Weis, as Chief Executive Officer, and Carpenter, as Chief Financial Officer, of BBC owed a duty to BBC to exercise the care that an ordinarily careful and prudent person would use in managing BBC and its subsidiaries and supervising their subordinates." Resp. App. D-2, D-3. The Plan Committee alleged that "Weis and Carpenter breached their duty of care to plaintiffs by negligently and carelessly failing to supervise Clements . . ." Resp. App. D-3. Thus, it was asserted that as a direct result of Clements' conduct, ". . . BBC lost in excess of $8,000,000." Resp. App. D-2. Further, it was alleged that:

> "[a]s a direct result of Weis' and Carpenter's negligence, as aforesaid, BBC lost in excess of $8,000,000. Moreover, as a direct result of their negligence, BBC was unable to survive as a profitable business which reasonably could have been expected to earn profits in excess of $15,000,000."

Resp. App. D-3.

Certain former BBC officers requested that the respondent, Reliance, provide coverage for the Plan Committee Action under the directors and officers liability insurance policy issued by Reliance to BBC.

Reliance, however, denied coverage because the Plan Committee Action was brought against the officers *on behalf of BBC* and asserted claims *on BBC's behalf* arising out of the breach

of fiduciary duties owed *to BBC* by its officers. Reliance's disclaimer was based upon Endorsement No. 1 of the policy, which states:

> The Insurer shall not be liable to make any payment for loss in connection with any claim made against the Directors or Officers: . . . by or on behalf of a director and/or officer or by or on behalf of the "Company", except for stockholder(s) derivative actions brought by a shareholder(s) of the Company other than a Director and/or Officer.

P. App. 4a.

The policy, under Section VI(J), provided that it would be governed by Delaware law:

> This policy, to the extent permitted by applicable law, shall be construed in accordance with the law of the jurisdiction of the incorporation of the Company named in Item A of the Declarations. . .

Resp. App. A-1.

BBC is named in the Declarations and is incorporated in the state of Delaware. Relevant portions of the Declarations are reproduced in the appendix to this brief. Resp. App. A-1. Thus, the policy should be construed in accordance with Delaware law.

It is important to note that under the policy, it was stated that BBC's bankruptcy did not alter the rights and obligations of any party to the insurance contract. Reliance's obligations remain unchanged upon the bankruptcy of any insured, pursuant to Section VIII(C):

> Bankruptcy or insolvency of a Director or Officer or a Director's or Officer's estate or of the Company shall not relieve the Insurer of any its obligations hereunder. . .

P. App. 4a.

Endorsement No. 4 of the policy conferred certain benefits upon the insured officers in the event of BBC's bankruptcy, in that a smaller $2,500 retention would be charged to them if BBC

went bankrupt, rather than the $150,000 company reimbursement which would apply if BBC declined to indemnify the officers for reasons other than bankruptcy. Resp. App. A-1, A-2.

While the policy therefore contains express provisions dealing with an insured's bankruptcy, it is devoid of any indication that Endorsement No. 1 would be eliminated or altered in the event of any such bankruptcy.

Reliance commenced the instant declaratory judgment action, *Reliance Insurance Co. v. Carl Weis, et al.*, 148 B.R. 575, (E.D. Mo. 1992), in the United States District Court for the Eastern District of Missouri, seeking a declaration that it had no obligation to defend or indemnify the former officers of BBC under its directors and officers liability insurance policy. It asserted that the Plan Committee Action was brought on behalf of BBC and thus excluded from coverage by the exclusion in Endorsement No. 1.

Reliance moved for summary judgment arguing that the Plan Committee Action was commenced by or on behalf of BBC, or by the Plan Committee as BBC's representative in bankruptcy "standing in the shoes" of BBC for the purpose of prosecuting all claims by BBC.

The Plan Committee cross-moved for summary judgment urging the Court to find coverage for this claim. It argued that the Plan Committee Action was commenced on behalf of the BBC bankruptcy estate and/or for BBC's creditors. In addition, the Plan Committee argued that because the Plan Committee Action was the equivalent of a shareholders' derivative action, it was not excluded under Endorsement No. 1.

The District Court granted summary judgment in favor of Reliance, finding that the Plan Committee Action was brought "on behalf of BBC" against its own officers and excluded by Endorsement No. 1. That ruling was based upon the Plan and its the provisions authorizing suit against BBC's officers, the Plan Committee's Complaint, the Bankruptcy Code, and the policy.

The District Court stated that under the United States Bankruptcy Code § 541(a)(1), the property of a bankruptcy estate is

defined as "all legal or equitable interests *of the debtor* in property as of the commencement of the case." P. App. 16a. (Emphasis added.) It found that the estate inherited all causes of actions by BBC against others, and that BBC's bankruptcy representative may pursue such claims on behalf of the debtor. The Court stated:

> It is significant that the definition of the estate embraces causes of action belonging to the debtor at the time of the commencement of the action . . . Under Section 541, the estate succeeds to any right of action a debtor corporation may have to recover for damages for misconduct, mismanagement or neglected duty by a corporate officer or a director, and the trustee has the authority to bring such actions on behalf of the debtor corporation.

P. App. 16a.

The District Court also found that a trustee or, in this case, a liquidation and distribution agent, "stands in the shoes of a debtor corporation", P. App. 16a, and can only prosecute causes of action *belonging to the debtor.* It found that the claims in the Plan Committee Action could have been brought by BBC, as "the estate's legal and equitable interest in property rise no higher than those of the debtor". P. App. 17a. The District Court concluded that BBC's right of action against its officers and directors was transferred to its bankruptcy estate upon the filing of the bankruptcy petition and that the Plan Committee had the authority to pursue this action to recover assets for the estate. Thus, it was clear that the Plan Committee Action was filed on behalf of BBC, within the meaning of Endorsement No. 1.

The District Court rejected as "meritless" the Plan Committee's argument that the action was actually a shareholders' derivative action, as none of the prerequisites under Delaware law for such a suit had been met. P. App. 21a.

In an unpublished decision, the United States Court of Appeals for the Eighth Circuit affirmed "on the basis of the well-reasoned opinion of the District Court." P. App. 23a-24a.

REASONS FOR DENYING THE WRIT

The writ should be denied since none of the "special and important reasons" for granting a petition for a writ of certiorari are present. Simply stated, the central issues involve whether a bankruptcy representative of a commercial corporation acts on behalf of the bankrupt company in asserting a breach of fiduciary duty claim against the company's officers and, correspondingly, whether under Delaware law this claim is excluded under a directors and officers liability insurance policy that excludes coverage for claims against such officers "by or on behalf of" the bankrupt company. This case does not involve a controlling question of federal law, but merely focuses on the interpretation of an insurance policy pursuant to state law; there is no conflict between the U.S. circuit courts on this issue; it does not relate to any significant question of public policy; and the lower court correctly ruled in favor or the respondent.

The considerations governing this Court's review of a writ of certiorari are, in part, as follows:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with a decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure from a lower court, as to call for an exercise of this Court's power of supervision.

U.S. Sup. Ct. Rule 10.1(a), 28 U.S.C.A.

This case does not embrace any of the above considerations. An important question of federal law was *not* decided, as the Court of Appeals affirmed the lower court's interpretation of an insurance policy pursuant to Delaware law. Indeed, the petitioner admits that Delaware law applies. Petitioner's Brief, p. 17, n. 7. Moreover, it is well established that state law controls the interpretation of insurance policies and federal courts sitting in diversity should follow those decisions. Supreme Court review of such issues controlled by state law is unwarranted and unnecessary.

There is no conflict on any pertinent issue in this case between the United States courts of appeals. This is highlighted by the petitioner's brief, which refers only to decisions of the lower federal courts. In fact, the District Court herein essentially found that the decisions cited by the petitioner on similar exclusions in directors and officers policies ("D&O" policies) involved bank failures governed by federal banking laws and interests, rather than commercial bankruptcies affected by such federal concerns. Such decisions were rendered only by federal district courts. In any event, they are not controlling in this case, where there are no federal banking statutes or entities at issue.

To the extent that reference was made to the Bankruptcy Code and caselaw to construe the exclusion, the opinion below is consistent with the longstanding principle that a bankruptcy representative "stands in the shoes" of the bankrupt company under its contracts and insurance policies. There is nothing controversial or earth-shattering about that principle or its application to D&O policies or any other insurance policies or contracts. The decision follows rather than departs from controlling precedent relating to insurance coverage for bankrupt companies, and is consistent with the "accepted and usual course of judicial proceedings."

For the foregoing reasons, this Court should not accept the petitioner's writ.

I. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS ON THE QUESTIONS PRESENTED

The petitioner erroneously asserts that this Court should exercise its judicial discretion because there is a conflict among the "lower federal courts" on the issues in this case. Petitioner's Brief,

p. 10. This is an utterly inadequate basis for Supreme Court intervention, as only a conflict among United States courts of appeals justifies such a review.

The petitioner has not cited a single case from any jurisdiction, let alone a circuit court of appeals, interpreting the Bankruptcy Code in a way so as to decline, under Delaware or any other state's law, to enforce an insured v. insured exclusion against a claim by a bankruptcy representative of a commercial corporation against its officers. The petitioner only cited district court decisions declining to enforce such exclusions, and then only in the context of bank failure cases governed not by the Bankruptcy Code but by federal banking laws.

In the petition's only reference to a purportedly conflicting circuit court decision, the petitioner asserts that the appeal did not even address the insured v. insured exclusion:

> . . . *FDIC v. Zaborac*, 773 F. Supp. 137, 144 (C.D. Ill. 1991), *aff'd sub nom FDIC v. American Casualty Co. of Pennsylvania*, 998 F.2d 404 (7th Cir. 1993)(*not reaching issue of scope of "insured v. insured exclusion*)."

Petitioner's Brief, p.12. (Emphasis added).

In fact, the Seventh Circuit's opinion in that case tacitly approves the insured vs. insured exclusion:

> . . .[T]he plain language of Endorsement #8 [the insured vs. insured exclusion] of the policy would have excluded from coverage an action by the Bank itself against the directors or officers.

998 F.2d at 408.

There is clearly no conflict among the federal circuits on the pertinent issue, *i.e.*, Delaware's treatment of the insured v. insured exclusion under a contract of D&O insurance in a private commercial bankruptcy.

II. THIS CASE IS BASED UPON THE INTERPRETATION OF AN EXCLUSION IN A DIRECTORS AND OFFICERS LIABILITY INSURANCE POLICY GOVERNED BY DELAWARE LAW

This writ should also be denied since the Court of Appeals did not ultimately decide a controlling question of federal law. It merely affirmed the District Court's interpretation of the Reliance policy under *Delaware law*.

This Court has stated that a "principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. U.S.*, 111 S. Ct. 1854, 114 L. Ed.2d 385 (1991). Federal courts sitting in diversity must apply state, not federal law in construing D&O policies. *Reliance Insurance Co. v. Weis, et al.*, 148 B.R. 575 (E.D. Mo. 1992), *aff'd* 5 F.3d 532 (8th Cir. 1993) (Delaware law); *Fidelity and Deposit Co. of Maryland v. Zandstra*, 756 F. Supp. 429 (N.D. Cal. 1990) (California law); *American Casualty Company v. Baker*, 758 F. Supp. 1340 (C.D. Cal. 1991) (Oklahoma law); *Gary v. American Casualty Co.*, 753 F. Supp. 1547 (W.D. Okla. 1990) (Oklahoma law), *aff'd on other grounds sub nom. FDIC v. American Casualty Co.*, 975 F.2d 677 (10th Cir. 1992).

The District Court below found the policy's choice of law provision controlling and determined that Delaware law must be applied:

> . . . [T]he insurance policy in question clearly states that Delaware law shall control in cases regarding interpretation and application of the policy. Section VI, subsection J. . . . [T]herefore this Court elects to apply Delaware law as to the interpretation and validity of the insurance policy at issue, especially with regard to Endorsement 1.

P. App. 12a.

The petitioner concedes that Delaware law "is the law applicable to the [Reliance policy]. . ." Petitioner's Brief, p. 17, n. 7. Reliance can conceive of no compelling reason why this Court should use this case to jump into the thicket of insurance

policy interpretation, an area long governed by state law. As there is no controlling federal question at issue, this Court should deny the petitioner's writ of certiorari.

Insofar as the opinion below states that the Plan Committee, as BBC's bankruptcy representative, merely stands in BBC's shoes, that decision is in total accord with federal and state precedent. *See* Point IV below. As such, this decision fosters no conflict with any circuit.

III. THE QUESTIONS DECIDED IN THIS CASE WILL NOT GENERATE EXTENSIVE LITIGATION

The petitioner baldly contends that the questions presented here will arise in *every* bankruptcy in which there is a claim against the directors or officers and a policy of directors and officers liability insurance. However, the petition has failed to identify a single precedent interpreting an "insured vs. insured" exclusion in a claim in a commercial bankruptcy.

The impact of this decision on cases arising out of private, corporate bankruptcies cannot under any stretch of imagination be as great as predicted. If the issue was as significant as portrayed by the petitioner, surely a similar dispute would have surfaced in other commercial bankruptcies where D&O insurance was involved, and the petitioner would rely upon the decisions from those bankruptcy cases rather than the bank failure cases to which it is forced to analogize.

Directors and officers of companies with D&O policies are quite capable of reading their policies and apprehending that the insurer is unwilling to cover certain defined risks, such as the company's claims against its own officers. Knowing that their insurance policies in plain and unequivocal terms exclude such claims asserted before the bankruptcy of their company, it is easy enough for them to understand that they will not be covered for the same claim post-bankruptcy. If they are unhappy with the policy, they can either try to negotiate its terms before purchasing it, or buy a better policy from another insurer. Disputes between bankrupt corporations, their officers, and their D&O insurers on the scope of the insured v. insured exclusion thus will

not often arise, as all parties must readily recognize that such a claim constitutes a risk that the insurer is not willing to insure and one the courts are unwilling to compel it to cover.

Of interest, other courts have upheld similar insured vs. insured exclusions in directors and officers policies. *Fidelity and Deposit Company of Maryland v. Conner*, 973 F.2d 1236 (5th Cir. 1992); *Bendis v. Federal Ins. Co.*, No. 89-2035-S, 1989 WESTLAW 161437 (D. Kan. Dec. 4, 1989), *aff'd on other grounds*, 958 F.2d 960 (10th Cir. 1991); *Levy v. National Union Fire Ins. Co.*, 889 F.2d 433 (2d Cir. 1989); *Powell v. American Casualty Insurance Company of Reading*, 772 F. Supp. 1188 (W.D. Okl. 1991). In so doing, these courts have implicitly rejected the view that such exclusions would have the detrimental effect on corporate life suggested by the petitioner. In the *Conner* case, the Fifth Circuit enforced the exclusion in a third-party claim by a director against former directors:

> We find that there is no interpretation of the insured v. insured exclusion as it pertains to the third party claims asserted by Conner - that is, the plain language of the insured v. insured exclusion bars Conner's claims against his former colleagues.

973 F.2d at 1245.

In *American Casualty Company of Reading, Pa. v. FDIC*, 944 F.2d 455 (8th Cir. 1991), which upheld the "regulatory exclusion" of a D&O policy issued to a bank later taken over by the FDIC, the court expressed views equally applicable to the petitioner's contention:

> The parties are sophisticated business people who dealt [with each other] at arm's length . . . We will not discard their agreement and remake their business relationship . . . Nor can we agree that . . . [the policy] was unconscionable. It was a bargain struck by adult business people. We have no reason to suppose that a better deal could have been gotten for the bank from any other insurer.

944 F.2d at 459-460.

While the petitioner asserts that the decision below removed the protection of insurance coverage "at the very moment when it is of the greatest value", Petitioner's Brief, p. 18, BBC's officers had to know in advance, merely by reading the Reliance policy, that claims against them by or on behalf of BBC would not be covered. As insurance policies remain intact and binding after bankruptcy, this decision will not have any major impact on such proceedings, deter officers from such employment, or generate new sources of disputes between such parties.

In fact, Endorsement No. 1 is for all practical purposes unaffected by the filing of a petition in bankruptcy. The insureds under the policy have no lesser protection as a result of this endorsement post-petition as they would have pre-petition.

IV. THE COURT OF APPEALS CORRECTLY DECIDED THE QUESTIONS PRESENTED

The court below correctly concluded that the Plan Committee Action is a claim on behalf of BBC against its former officers. It followed the longstanding rule that a bankruptcy representative "stands in the shoes" of the debtor corporation under its contracts and insurance policies, subject to the same defenses that could have been raised against the bankrupt corporation and possessing the same rights and causes of action of the corporation. The Court of Appeals also correctly held that the Plan Committee Action was not a shareholders derivative action, as none of the prerequisites for filing such a suit were met.

A. *Because A Bankruptcy Representative's Causes of Action Are Derived From Those Previously Held By The Debtor Company, The Plan Committee Action Is An Action On Behalf Of BBC*

The lower courts held that pursuant to the Bankruptcy Code, the Plan, and the relevant case law, the Plan Committee Action is a claim on behalf of BBC. The courts correctly saw no meaningful distinction in relation to the Plan Committee's causes of action between BBC and its bankruptcy estate, as the estate and the vehicle through which it acts, the Plan Committee, merely derive their rights and claims from BBC.

The petitioner states that the opinion below erroneously "ignored the separate legal existence of the bankruptcy estate and the debtor. . ." Petitioner's Brief, p. 14. Rather, the district court stated that for the purpose of determining whether the "insured v. insured" exclusion applied, there was "no significant legal distinction" between BBC and its bankruptcy estate, since the Plan Committee Action was a claim filed on behalf of BBC and its estate. P. App. 2a. The action on behalf of either entity was based on BBC's rights, BBC's officers' misconduct, and BBC's damages, and is a claim "by or on behalf of" BBC within the plain language of Endorsement No. 1.

The documents and pleadings in BBC's bankruptcy proceeding creating the Plan Committee reveal that it could only pursue claims which passed from BBC to the estate and then to the Committee. BBC's claim against its officers was transferred to the Plan Committee, as were its rights under the D&O policy.

The Plan Committee acquired BBC's rights subject to all contractual and common law defenses and obligations that existed when bankruptcy was filed. *In re Feiereisen*, 56 B.R. 167 (D. Oregon 1985) (the bankruptcy trustee stands in the shoes of the debtor and has the same rights and duties under the debtor's insurance policy); *In re Daisy Systems Securities Litigation*, 132 B.R. 752 (N.D. Cal. 1991) (insurance policies are property of the bankruptcy estate); *In re Light*, 23 B.R. 482 (E.D. Mich. 1982). In *In re Light*, *supra*, the Court described a bankruptcy trustee's status under a debtor's insurance policies as follows:

> . . . a trustee in bankruptcy . . . is not an independent co-insured under a policy of insurance. Rather, the bankruptcy trustee takes interest in the insurance policy pursuant to the interest of the debtor . . . "standing in the shoes", as it were.

23 B.R. at 484.

The claim against BBC's officers, now prosecuted by the Plan Committee, must meet the same fate under the Reliance policy as if it was pursued by BBC: it is excluded from coverage due to Endorsement No. 1.

The lower courts' opinions were also a proper application of the principle that BBC's bankruptcy did not alter or expand Reliance's obligations or BBC's or any other insureds' rights under the Reliance policy. *See In Re Ozark Restaurant Equipment Company, Inc.*, 816 F.2d 1222 (8th Cir. 1987); *In Re Louisiana World Exposition, Inc.*, 832 F.2d 1391 (5th Cir. 1987); *In Re Daisy Systems Securities Litigation*, 132 B.R. 752 (N.D. Cal. 1991). The policy's terms, conditions, and exclusions, including the "insured vs. insured" exclusion, remain fully enforceable after BBC's bankruptcy.

As the petitioner notes, bankruptcy is not intended to protect the bankrupt corporation's insurance companies. Petitioner's Brief, p. 19. No such protection has been granted to Reliance, since a claim by BBC for breach of fiduciary duties against its officers would have been excluded before or after BBC's bankruptcy. The petitioner's contention that the decision below constitutes an unjustifiable windfall for Reliance is therefore preposterous.

The petitioner cites other irrelevant cases, *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 105 S. Ct. 1986 (1985) and *Pepper vs. Litton*, 308 U.S. 295, 60 S. Ct. 238 (1939) in support of the proposition that the Plan Committee represents the creditors and shareholders of BBC. In *Commodity Futures*, the issue was whether a trustee could waive the corporation's attorney-client privilege on pre-bankruptcy communications. That clearly has no bearing upon a bankrupt company's status under an insurance policy. The Court merely indicated that the trustee has a fiduciary duty to the shareholders as well as the creditors of the bankrupt corporation. Whether or not the Plan Committee owes such duties, its rights under Reliance's policy are no greater than those previously possessed by BBC. Similarly, *Pepper v. Litton* is inapplicable as it primarily involved the disallowance by the bankruptcy court of a claim against the estate by the dominant shareholder of the bankrupt company. It in no way refutes the principle that a bankruptcy trustee or other representative stands in the shoes of the debtor in asserting the debtor's claim.

B. *The Plan Committee Action Is Not A Claim On Behalf Of BBC's Creditors*

A representative in bankruptcy has no legal standing to assert claims on behalf of the bankrupt's creditors. *See Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 429, 92 S. Ct. 1678, 32 L. Ed.2d 195 (1972); *In re Ozark Restaurant Equipment Co., Inc., supra*; *In re Petroleum Corp. of America*, 417 F.2d 929 (8th Cir. 1969). The bank failure decisions cited by the petitioner, such as *American Casualty Co. vs. FDIC*, 791 F. Supp. 276 (W.D. Okla. 1992), and *Fidelity and Deposit Co. v. Zandstra*, 756 F. Supp. 429 (N.D. Cal. 1990), add nothing to the analysis in this case, because in those cases federal banking statutes provided that the FDIC and FSLIC could sue as successors to the failed bank, in their own right as creditors, and also on behalf of the bank's creditors. Under the Bankruptcy Code, the Plan, the Disclosure Statement, and the Reliance policy, the Plan Committee merely stands in the shoes of BBC when prosecuting its claims against BBC's former officers. It does not represent the creditors of that company.

The petitioner also argues that the Plan Committee acts on behalf of creditors, because they benefit from any recovery obtained by the Plan Committee. In rejecting this argument, the lower court stated that "the pending State Court action was filed on behalf of BBC and its estate, although the benefits sought may eventually inure to the creditors." P. App. 2la. Whether BBC's creditors benefit from the Plan Committee action is irrelevant; the ultimate question is on whose behalf was the action commenced? As a bankruptcy representative possesses only those rights or causes of action transferred to it by the debtor, the answer must be "on behalf of" the debtor, BBC.

The petitioner quotes *In re Fidelity America Financial Corp.*, 43 B.R. 74 (Bkrtcy. E.D. Pa. 1984): "[t]he trustee acts as the representative of the estate, managing its funds for the benefit of its creditors." Petitioner's Brief, p. 15. This indicates that the bankruptcy trustee acts as the estate's representative, not the creditors'. While the trustee may manage funds for the creditors' benefit, the trustee in no official sense represents those creditors.

C. *The Bank Failure Cases Extensively Relied Upon By Petitioner Have No Bearing Upon The Interpretation Of A Directors and Officers Liability Insurance Policy In The Bankruptcy Of A Commercial Corporation Under The U.S. Bankruptcy Code*

If the insured vs. insured exclusion is as significant in banking matters as averred by the petitioner, any case reaching this Court on that point should undoubtedly arise out of an actual bank failure handled by federal banking regulators. Only in such a case would a full record be presented reflecting the purported significance of the exclusion on the regulation and operation of such institutions.

The District Court and the Court of Appeals correctly recognized the inapplicability of precedent relating to failed financial institutions:

> The Court has carefully reviewed the caselaw cited by the parties. Unfortunately, these cases are not extremely helpful in providing guidance to the Court. The majority of cases cited deal with exclusion clauses similar to the present one, however, the interpretation and application of the clause is limited to facts involving bank failures. The principles espoused are restricted to the unique situation of the FDIC or the RTC taking control of a failed bank. The present situation deals with a bankrupt corporation no longer physically or legally in existence as it had been before the bankruptcy. The Court is constrained to draw from the basic tenets of insurance law and bankruptcy law in order to resolve this matter.

P. App. 14a.

In a case cited by the petitioner, *Office and Professional Employees' Int'l Union, Local 2 v. FDIC*, 962 F.2d 63 (D.C. Cir. 1992), the court found that as the claim procedures of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") do not define the terms "claim" and "claimant", it was appropriate to borrow the bankruptcy law's

definition of these terms. In the instant action, the provisions of FIRREA or any other federal banking statute are not at issue. Further, *Office and Professional Employees* did not find a direct analogy between federal banking law and the Bankruptcy Code, it merely stated that the terms of statutory scheme could be borrowed to clarify a gap in another statute. From this limited finding, the petitioner leaps to the faulty premise that the status of the FDIC under the banking laws is similar to the Plan Committee under the Bankruptcy Code. BBC was not a bank and the Plan Committee is simply not the FDIC.

The petitioner incorrectly relies upon bank failure cases such as *F.D.I.C. v. American Casualty Co.*, 814 F. Supp. 1021 (D. Wyo. 1991) and *Continental Casualty Co. v. Allen*, 710 F. Supp. 1088 (N.D. Texas 1989) to assert that insured v. insured exclusions are ambiguous unless they actually refer to the specific person or entity in question. Petitioner's Brief, p. 12. The Reliance exclusion is quite clear, however, in referring to claims "on behalf of" the company, which unambiguously encompasses claims in or out of bankruptcy by BBC's agents or representatives. Moreover, in the *Allen* case, the court found that the exclusion was ambiguous primarily because there was proof in the record of the insurer's own witness' "inability to understand the definition of 'insured' and meaning of the endorsement." 710 F. Supp. 1088 at 1098. There is absolutely no proof in the record in the instant case that any party or any insured did not understand the exclusion in the Reliance policy. Hence, under the reasoning of *Allen*, there is no basis to support a finding of ambiguity in Endorsement No. 1.

In the same vein, the Reliance exclusion would not have been found ambiguous by the *American Casualty* court, as the exclusion clearly applies to any claim brought not only by the insured company but on its behalf, such as a claim passing from BBC to its bankruptcy estate and the Plan Committee.

A very recent decision by the United States District Court, Southern District of New York, further confirms that the decision below is entirely consistent with the principles governing bankruptcy representatives' rights under insurance policies issued to the debtor. *Niemuller v. National Union Fire Insurance*

Company of Pittsburgh, Pa., 92 Civ. 0070 (SS), 1993 U.S. Dist. LEXIS 18476 (December 29, 1993). In a case involving the assignment of a corporation's breach of fiduciary duty claim against its officer, the court enforced against the defendant a comparable insured vs. insured exclusion in a D&O policy, finding that an assignee "stands in the shoes" of the assignor corporation and is subject to the same defenses as that corporation. The court emphatically rejected the defendant's reliance upon the bank failure cases (also cited by the petitioner herein) relating to the insured v. insured exclusion.

Addressing the rights of an assignee of a corporation rather than its bankruptcy representative, *Niemuller* applies with equal force to the Plan Committee Action and the exclusion in the Reliance policy:

> It is clear law that an assignee steps into the shoes of the assignor and gains only so much as that to which the assignor is entitled. See Septembertide Publishing B.V. v. Stein & Day, Inc., 884 F.2d 675, 681-82 (2d Cir. 1989), citing International Ribbon Mills, Ltd. v. Arjan Ribbons, Inc., 36 N.Y.2d 121, 126, 325 N.E.2d 137, 365 N.Y.S.2d 808 (1975) ("It is elementary ancient law that an assignee never stands in any better position than his assignor. He is subject to all equities and burdens which attach to the property assigned because he receives no more . . . than his assignor.") An assignee is in no better or worse position than the assignor. . . .
>
> This traditional rule is no less applicable to the present case. DDCC and Sussex will become party plaintiffs in the pending Qantel litigation claims solely due to a transfer of interest. . . . They gain nothing more than Qantel, but similarly they are placed in no worse a position. Thus, if the Policies exclude the claims brought by Qantel, which plaintiff admits they do, then they also exclude those claims continued by successors-in-interest.

1993 U.S. Dist. LEXIS 18476, pp. 7-9.

The court convincingly distinguished the banking cases cited by the defendant and by the petitioner in the case at bar:

> In support of his argument that the Exclusion Clause extends only to a suit brought "by" Qantel and not successors-in-interest as assignees, Niemuller relies upon cases from other jurisdictions which involve regulatory banking agencies. These cases, however, are wholly distinguishable.
>
> The primary and determinative distinction between the entities involved in those cases and the assignees in the instant case is that the assignees in the cases noted by plaintiff are statutorily created entities charged by federal or state law with the obligation to pursue certain claims, including claims of other interested parties such as creditors. Thus, the rights and claims brought by these statutory entities are not analogous to those of an ordinary assignee.
>
> Plaintiff relies primarily on the reasoning of Fidelity & Deposit Co. of Md. v. Zandstra, 756 F. Supp. 429 (N.D. Cal. 1990), and cases adopting its approach. See American Casualty Co. of Reading, Pa. v. Baker, 758 F. Supp. 1340 (C.D. Cal. 1991) (following Zandstra); Finci v. American Casualty Co. of Reading, Pa., 323 Md. 358, 383, 593 A.2d 1069 (1990) (citing Zandstra and American Casualty Company). . . . However, as the court in Zandstra explicitly recognized, the FDIC was not an ordinary assignee and, thus, deserved dissimilar treatment from that accorded other assignees in the same situation.
>
> In reaching its decision that the Exclusion Clause did not apply, the court noted the unique character of the FDIC. As the court stated, regulatory banking agencies have greater standing than ordinary successors-in-interest because they, empowered by statute, represent the bank as well as the creditors, depositors and shareholders of the bank. . . . [T]he

> Zandstra court concluded, "the FDIC did not merely stand in the shoes of the original party." . . .
>
> * * *
>
> As noted previously, and in no way undermined by the regulatory cases cited by Niemuller, ordinary assignees have neither independent claims nor any greater rights than those belonging to their assignors. Therefore, there is no reason to rely upon the regulatory cases cited by Niemuller in interpreting the Exclusion Clause at issue in this case.

Id. 9-12.

Whatever special right the FDIC may have to circumvent exclusions in a bank's D&O policy, that right simply was not conferred upon the Plan Committee in the instant matter or the assignees of Qantel in *Niemuller*.

D. *As Found By The Lower Courts Herein, Because The Plan Committee Action Is Not A Shareholders' Derivative Action, It Does Not Fall Within The Narrow Derivative Suit Exception To The "Insured vs. Insured" Exclusion.*

The Plan Committee Action is neither a shareholders' derivative action nor comparable to such an action, since it fails to comply with Delaware's statutory requirements for a shareholders' derivative suit. Even if the Plan Committee Action is, in the petitioner's words, in "the nature of a derivative suit," Petitioner's Brief, p. 16, it would not fall within the narrow exception of the exclusion that encompasses only actual derivative suits. The lower courts correctly found the petitioner's construction of the shareholders' derivative suit part of Endorsement No. 1 to be "meritless." P. App. 21a.

None of the requirements for a derivative action under Delaware law have been met by the Plan Committee Action:

> . . . the complaint shall allege that the plaintiff was a shareholder or member at the time of the transaction

> of which he complains for his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and the reasons for his failure to obtain the action or for not making the effort.

Chancery Court Rule 23.1 Del. C. Ann. *See also* § 327 Del. Corp. Law Annotated.

The lower court correctly found that the Plan Committee Complaint lacked any allegations about shareholders or their efforts to obtain through the BBC's directors the relief sought in the Complaint. As "[n]one of the prerequisites under Delaware law for filing a shareholders derivative action have been met" the action did not fall within the exception to the exclusion. P. App. 21a.

In any event, it is clear that this entails Delaware law, and not a matter of federal law warranting review by this Court.

The petitioner also contends that the Plan Committee Action is in "the nature of a derivative suit," in asserting claims for breach of fiduciary duty that *could have* been asserted by shareholders. Asserting claims that *could have* been pressed by shareholders does not transform this suit into an *actual* shareholders derivative action. *Fidelity and Deposit Company of Maryland v. Conner, supra; Evanston Insurance Company v. FDIC*, 1988 U.S. Dist. LEXIS 16263 (C.D. Cal. 1988). An actual shareholders derivative action is the only exception to the exclusion in the Reliance policy. *See* also, *FDIC v. American Casualty Company of Reading, Pa.*, 998 F.2d 404, 409 (7th Cir. 1993): "The FDIC's complaint contains none of the allegations necessary to maintain a shareholder derivative action under Fed. R. Civ. P. 23.1, such as the Bank's refusal to file suit."

By the guise of artful construction, the petitioner seeks to impose an obligation upon Reliance to which it never agreed. However, the controlling Delaware rules of construction prohibit a court from crafting an interpretation that is inconsistent

with the intent of the parties or the clear language of their agreement. *New Castle County v. Hartford Accident & Indemnity Co.*, 970 F.2d 1267, 1270 (3d Cir. 1992); *Hallowell v. State Farm Mutual Automobile Ins. Co.*, 443 A.2d 925 (Del. 1982); *Aetna Casualty & Surety v. Kenner*, 570 A.2d 1172, 1174 (Del. Supr. 1990); Delaware's Supreme Court has stated that the words of an insurance policy should not be destroyed or twisted under the guise of construing them. *Aetna Casualty & Surety v. Kenner*, 570 A.2d at 1174; *Hallowell v. State Farm Mutual*, 443 A.2d at 926. The lower courts herein were well aware of Delaware's rules of construction in refusing to stretch the shareholders' derivative exception in Endorsement No. 1 to the unwarranted lengths sought by the petitioner.

V. THERE ARE NO SIGNIFICANT MATTERS OF PUBLIC POLICY IMPLICATED BY THIS CASE, WHICH MERELY INVOLVES THE INTERPRETATION OF AN EXCLUSION IN AN INSURANCE POLICY ISSUED TO DIRECTORS AND OFFICERS

If the petitioner's dire views of this decision were accepted, every time a corporation with a dispute over the exclusions in its insurance policy entered bankruptcy, an overriding question of federal bankruptcy law would be triggered. From the petitioner's perspective, if the insured v. insured exclusion is upheld in bankruptcies, no prudent person would serve on a board or act as an officer of a corporation. A series of cases, however, have already upheld insured v. insured exclusions, both in the corporate and failed bank settings. Of course, our economy has not come to a screeching halt occasioned by the abrupt resignation of corporate directors and officers, or the inability of companies to find new, qualified, and willing candidates for such positions. Seasoned executives are no more likely to withdraw from corporate life because of the insured v. insured exclusion in a D&O policy than homeowners are likely to give up their homes because of exclusions in their homeowners' liability insurance policies.

Furthermore, if the exclusion is as onerous as suggested by the petitioner, perhaps insureds should negotiate with their insurers to eliminate it from their D&O policies.

When insurance policies are issued to corporations whose officers and directors can gauge the scope of coverage and the effect of the exclusions by simply reading their terms and conditions, no overriding federal public policy concern is created. The interpretation of such policies has long been a matter of state law. The petitioner asks this Court to rule on a matter of Delaware insurance law, without demonstrating how the opinion below unduly impairs or affects urgent matters of federal public policy. There is simply no persuasive reason for this Court to become involved in such a straightforward interpretation of an insurance policy governed by Delaware law.

CONCLUSION

For the reasons discussed above, the petition for a writ of certiorari should be denied by this Court.

Dated: New York, New York
January 21, 1994

Respectfully submitted,

PERRY KREIDMAN

Counsel of Record

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APPENDIX

A. THE INSURANCE POLICY AND DECLARATIONS

INSURANCE POLICY

Endorsement No. 4

It is understood and agreed that:

1. Insuring Agreement I.A is amended by adding the following:

> If the Company is permitted or required by law to ultimately indemnify a Director or Officer, or to advance costs and/or defense expenses on their behalf and does not in fact do so other than for reason of the Financial Insolvency of the Company, then the Insurer shall pay all loss on behalf of the Director or Officer, subject to the third listed deductible amount set forth in Item D, Retention, of the Declarations and all provisions, terms and conditions of this policy.

* * *

VII GENERAL CONDITIONS

* * *

J. Situs

This policy, to the extent permitted by applicable law, shall be construed in accordance with the law of the jurisdiction of incorporation of the Company named in Item A of the Declarations or, in the case of matters pertaining to a Subsidiary, the law of the jurisdiction or incorporation of such Subsidiary.

DECLARATIONS

ITEM A: Name of Insured and Address:

Bank Building & Equipment Corporation of America
3630 South Geyer Road
St. Louis, Missouri 63127

* * *

ITEM D: RETENTION

$ 2,500.00	each Director or Officer, each loss, including claim expense, but in no event exceeding
$ 10,000.00	in the aggregate each loss, including claim expense, as respects Directors and Officers
$150,000.00	in the aggregate each loss, including claim expense, as respects Company Reimbursement

* * *

B. FIRST AMENDED JOINT PLAN OF LIQUIDATION OF BBC

* * *

1.12 Consolidated Debtors shall mean the procedurally combined estates of *In re Bank Building and Equipment Corporation of America*, Case No. 90-02011-BKC-DPM, *In re BBC Manufactured Buildings, Inc.*, Case No. 90-02571-BKC-DPM and *In re Accesseron Products, Inc.*, Case No. 90-02572-BKC-DPM.

* * *

12.1 This Plan contemplates the liquidation of all the property of the Consolidated Debtors . . . and the prosection of any and all claims or causes of action held by the estates of the Consolidated Debtors by the Plan Committee . . . on behalf of the estates both prior to and after the Effective Date, to the extent the Plan Committee believes such prosecution to be feasible and warranted.

* * *

12.3 . . . Once appointed, the Plan Committee . . . shall be responsible for prosecuting and defending any and all claims and causes of action relating to the Consolidated Debtors' estate, including, without limitation (1) claims of each estate against any Person (including, without limitation, any claims or causes of action arising under Sections 544, 545, 547, 548, 549 and 553(b) of the Bankruptcy Code), (b) claims of any Person against the estates or related Persons which affect the estates or interests of Creditors therein, and (c) objections to Disputed Claims scheduled or filed against the estates.

* * *

14.1 . . . The Plan Committee thereafter shall have the same authority to act for the Consolidated Debtors as a board of directors for each of the Consolidated Debtors and it shall

continue to act until all assets are liquidated, all distributions are made to Creditors pursuant to this Plan and a final decree is entered closing each bankruptcy estate, whereupon all of its powers and rights shall terminate and it shall be deemed dissolved. Upon confirmation, all causes of action belonging to any of the Consolidated Debtors shall vest and be brought in the name of the Plan Committee, on behalf of the particular Consolidated Debtor or Debtors in which the cause of action had been previously vested . . .

C. DISCLOSURE STATEMENT

* * *

V. ONGOING LIQUIDATION EFFORTS

* * *

One of the potential causes of action is a claim by BBC against certain of its former officers . . . arising out of the alleged failure of certain BBC officers . . . to detect and take significant action to prevent certain misconduct and fraud by Loughman Division officers and employees at the Loughman Division of BBC. The alleged misconduct of management of the Loughman Division and the potential causes of action are set forth in the report of the Court appointed Examiner David A. Warfield, who conducted an in depth review of the allegations at BBC's Loughman Division.

* * *

In the event legal action is not instituted prior to the Confirmation Date, Proponents expect the Plan Committee to employ special counsel to review the findings of the Examiner's report in order to determine in greater detail the possible legal actions available against certain officers of BBC . . . , to further investigate insurance coverage available under the D&O policy, to assess and calculate any damages and to pursue any appropriate legal action on behalf of BBC.

* * *

VII. THE PLAN OF LIQUIDATION

* * *

6. Reservation of Rights. The Plan Committee, by and through the Agent, shall have the right to bring all actions and proceedings belonging to the Consolidated Debtors or their Estates . . .

D. COMPLAINT IN THE PLAN COMMITTEE ACTION

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

RICHARD MILLER, as the Liquidation and Distribution Agent on behalf of H. BERNARD ENGEL; JAMES BURZYNSKI, as the representative of Jim & Slim's Tool Supply; and ARTHUR SHAFER, as the representative of Morgan Drive-Away, Inc., acting in the name of the Plan Committee for the Bankruptcy Estate of Bank Building and Equipment Corporation of America,

Plaintiffs,

v.

DOUG CLEMENTS,

Serve: 205 West Fourth
Waterloo, IL 62298
Monroe County, Illinois

CARL J. WEIS JR.,

Serve: 721 Twin Fawns Drive
St. Louis, MO 63131
St. Louis County, Missouri

MYRON CARPENTER,

Serve: 843 Gardenway Drive
Ballwin, MO 63011
St. Louis County Missouri

Defendants.

Cause No.
Team/Division

PETITION

Plaintiffs, for the Petition against Defendants and each of them, state as follows:

Parties

1. On or about April 30, 1990, Bank Building and Equipment Corporation of America ("BBC") filed for relief under Chapter 11 of the United States Bankruptcy Code. On July 22, 1991, the First Amended Joint Plan of Liquidation of BBC ("Plan") was confirmed by the court. Pursuant to the Plan, all causes of action belonging to the bankruptcy estate vest and shall be brought in the name of the Plan Committee, which has sole responsibility for implementing the Plan.

* * *

95. As President of Loughman, Clements had a fiduciary duty to BBC to act in the best interests of BBC.

96. Clements instead used his position as an officer and employee of BBC to further his own interests at the expense of BBC, as aforesaid, thereby breaching his fiduciary duty . . .

* * *

98. . . . As a direct result of the contracts wrongfully accepted by Clements, BBC lost in excess of $8,000,000.

99. Additionally, if Clements had not breached his duty to BBC as alleged, BBC would not have been forced to liquidate and would be an ongoing, profitable business. Clements therefore also damaged BBC by denying it the profits it could reasonably have been expected to earn, reasonably estimated to be in excess of $15,000,000.

* * *

102. Weis, as Chief Executive Officer, and Carpenter, as Chief Financial Officer, of BBC owed a duty to BBC to exercise the care

that an ordinarily careful and prudent person would use in managing BBC and its subsidiaries and supervising their subordinates.

103. As more particularly alleged above, Weis and Carpenter breached their duty of care to plaintiffs by negligently and carelessly failing to supervise Clements and the operations of Loughman, thereby permitting Clements to destroy Loughman – and with it BBC . . .

104. As a direct result of Weis' and Carpenter's negligence, as aforesaid, BBC lost in excess of $8,000,000. Moreover, as a direct result of their negligence, BBC was unable to survive as a profitable business which reasonably could have been expected to earn profits in excess of $15,000,000.

* * *